304.01.05 OBRA-93 AND DRA TRANSFER POLICY

Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66), herein referred to as OBRA-93, amended Section 1917 (c) (1) of the Social Security Act to revise transfer of assets policy previously described in the Medicare Catastrophic Coverage Act (MCCA) of 1988 (P.L. 100-360).

Assets disposed of on or before the enactment of OBRA-93, which was August 10, 1993, will be evaluated under MCCA policy. Assets disposed of on or after August 11, 1993, will be evaluated under policy mandated by OBRA-93 and revised by the Deficit Reduction Act of 2005, effective February 8, 2006.

304.01.05A DEFINITIONS APPLICABLE TO TRANSFERS AND TRUSTS

OBRA-93 added and amended the following definitions of terms used in conjunction with transfer and trust policy.

Individual—As used in this instruction, the term "individual" includes the individual himself or herself, as well as:

- The individual's spouse, where the spouse is acting in the place or on behalf of the individual;
- A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse, and
- Any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

Spouses—This is a person who is considered legally married to an individual under the laws of Mississippi.

Assets—For purposes of this section, assets include all income and resources of the individual and of the individual's spouse. This includes income or resources which the individual or the individual's spouse is entitled to but does not receive because of any action by:

- The individual or the individual's spouse;
- A person, including a court or administrative body, with legal authority to act in place or on behalf of the individual or the individual's spouse, or

Definitions Applicable to Transfers and Trusts - Assets(Continued)

- Any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

For purposes of this section, the term "assets an individual or spouse is entitled to" includes assets to which the individual is entitled or would be entitled if action had not been taken to avoid receiving the assets. The following are examples of actions which would cause income or resources not be received:

- Irrevocably waiving pension income;
- Waiving the right to receive an inheritance;
- Not accepting or accessing injury settlements;
- Tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of an individual who is a plaintiff; and
- Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony.

The above actions could result in an uncompensated transfer of assets. However, the specific circumstances of each case must be examined in order to determine if a transfer has occurred.

Resources—For purposes of this section, the definition of resources is the same definition used by the Supplemental Security Income (SSI) program, except that the home is not excluded for institutionalized individuals. In determining whether a transfer of assets or a trust involves an SSI-countable resource, use those resource exclusions and disregards used by the SSI program, except for the exclusion of the home for institutionalized individuals. This is discussed in more detail elsewhere in this chapter.

Income—For purposes of this section, the definition of income is the same definition used by the SSI program. In determining whether a transfer of assets involves SSI-countable income, take into account those income exclusions and disregards used by the SSI program. This is discussed in more detail in the chapter on income.

For the Sole Benefit of—A transfer is considered to be for the sole benefit of a spouse, blind or disabled child or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

Definitions Applicable to Transfers and Trusts (Continued)

For the Sole Benefit Of

Similarly, a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or any time in the future. However, the trust may provide for reasonable compensation for a trustee or trustees to manage the trust, as well as for reasonable cost associated with investing or otherwise managing the funds or property in the trust.

A transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not the spouse, blind or disabled child or disabled individual is not considered to be established for the sole benefit of one of these individuals. In order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from penalty consideration for eligibility purposes is void.

An exception to this requirement exists for trusts discussed in "Exemptions to Treatment of Trusts." Under these exceptions, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the Division of Medicaid, up to the amount of Medicaid benefits paid on the individual's behalf.

When these exceptions require that the trust be for the sole benefit of an individual, the restriction discussed in the previous paragraph does not apply when the trust instrument designates the Division of Medicaid as the recipient of funds from the trust. Also, the trust may provide for disbursal of funds to other beneficiaries, provided the trust does not permit such disbursals until the State's claim is satisfied.

304.01.05B TRANSFER PENALTY DEFINITIONS

Under the transfer of assets provisions in Section 1917(c) of the Act, as amended by OBRA 1993, coverage of certain Medicaid services to otherwise eligible institutionalized individuals who transfer (or whose spouses transfer) assets for less than fair market value must be denied. This same transfer prohibition is applicable to HCBS individuals and their spouses. The following definitions apply to transfers of assets.

Fair Market Value—Fair market value is an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria used in appraising the value of assets for the purpose of determining Medicaid eligibility.

NOTE: For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset must be in a tangible form with intrinsic value.

A transfer for love and consideration, for example, is not considered a transfer for fair market value. Also, while relatives and family members legitimately can be paid for care they provide to the individual under an acceptable personal services contract, Medicaid presumes that services provided for free at the time were intended to be provided without compensation. Refer to the full discussion of personal services contracts later in this chapter at 304.01.05M.

Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable, such as a written repayment schedule agreed to at the time services were provided.

Valuable Consideration—Valuable consideration means that an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset.

Uncompensated Value—The uncompensated value is the difference between the fair market at the time of transfer(less any outstanding loans, mortgages, or other encumbrances on the asset) and the amount received for the asset.

Transfer Penalty Definitions (Continued)

Institutionalized Individual—An institutionalized individual is an individual who is:

- An inpatient in a nursing facility;
- An inpatient in a medical institution for who payment is based on a level of care provided in a nursing facility; or
- An inpatient in an ICF-MR facility

HCBS Individual—A participant in a long-term care alternative program. Although not institutionalized, this individual is considered to be receiving long-term care services. The eligibility criteria for the HCBS individual are the same as those for the institutionalized person, including application of transfer policy.

Transfer of Asset Rules

Transfer of asset rules apply to the following:

- **Resources**

  Any real or personal property, annuity, liquid resource, or funds owned by the individual and his spouse that is given away, sold for less than fair market value, or used to purchase a promissory note, loan, mortgage, or life estate, waiving the right to receive any potential future resource that the individual might be entitled.

- **Income**

  Any earned or unearned income (including lump sum) of the individual and his or her spouse that is transferred to another individual in the month of receipt, waiving the right to receive any potential future income that the individual might be entitled.

304.01.05C EFFECTIVE DATE OF OBRA-93 TRANSFER POLICY

All transfers made on or after August 11, 1993, are treated under OBRA-93 rules with DRA amendments effective February 8, 2006. Transfers made before August 11, 1993, are treated under policy in effect prior to OBRA-93.

While this section applies to transfers made on or after August 11, 1993, penalties for transfers for less than fair market value under OBRA-93 cannot be applied to services provided before October 1, 1993. Apply pre-OBRA-1993 rules regarding transfers of assets to transfers made on or after August 11, 1993, and before October 1, 1993.

As indicated above, the effective date of all DRA changes is February 8, 2006. Assets disposed of on or after February 8, 2006, will be evaluated under OBRA-93 and any changes mandated by the DRA. The DRA changes are noted.

Individuals to Whom Transfer of Assets Applies

Apply these provisions when an institutionalized individual, HCBS waiver individual or the individual's spouse disposes of assets for less than fair market value on or after the look-back date explained below. For purposes of this section, assets transferred by a parent, guardian, court or administrative body, or anyone acting in place of or on behalf of or at the request or direction of the individual or spouse are considered to be transferred by the individual or spouse.

Verification and Documentation

In addition to the initial application, look for a transfer of assets at the time of review, when a transfer is reported, or when there is a request for a change to institutional or HCBS coverage. When there has been a transfer of assets during the look-back period, obtain the following documentation:

- A description of the asset transferred (the home, other real property, life estate, cash, lump sum, car, stocks, bank account, certificate of deposit, etc.).
- The name of the person who transferred the asset (client, spouse, legal representative).

Verification and Documentation (Continued)

- The name of the person(s) to whom the asset was transferred.
- The client's relationship to the individual to whom the asset was transferred.
- The countable value of the asset at the time of the transfer and the compensation (money or other benefit) received or expected to be received from the transferred asset.
- The date the asset was transferred.
- Whether the applicant was the sole owner of the asset at the time of the transfer; if not the name of any co-owners.
- If applicable, documentary evidence that the individual intended to dispose of an asset at fair market value or information from knowledgeable sources to support the value (if any) at which the asset was disposed.

304.01.05D LOOK BACK PERIOD

The Deficit Reduction Act of 2005 changed the look back period to 5 years (60 months) effective for institutional applications filed on or after February 8, 2006. The 60-month rule applies to any type of asset transferred including assets placed in a trust.

Transfers that took place during the 5-year look back period, but prior to February 8, 2006, will be evaluated using previous transfer of assets policy and the penalty period is calculated under the rules in effect at the time of the transfer.

Application of the DRA transfer rules is being phased in over the 60 month period starting February 8, 2006. Because the DRA implementation date will not change, the length of the look back period to evaluate transfers under DRA rules will increase each month by one month until it reaches 60 months in February 2011.

Under OBRA-93, the look-back period for transfers other than transfers to a trust is a date that is 36 months from the date the individual both is an institutionalized individual and has applied for Medicaid.

The following example illustrates this:

12/94 – enters nursing facility
02/95 – applies & 36 month look-back begins
11/94 – transfer occurs & penalty begins

The 36 month look-back period described above did not become fully effective until August 11, 1996 and was phased in over a 36 month period beginning August 11, 1993. Therefore, OBRA transfer rules are effective for transfers made on or after August 11, 1993. Any transfers actually made before that date are treated under the rules described in pre-OBRA-93 policy.

304.01.05E APPLYING THE TRANSFER PENALTY

Denial of coverage or services because assets were transferred for less than Fair Market Value is known as a transfer penalty. Under the DRA, transfer penalties are applied differently to institutionalized individuals and those applying for, or receiving, Home and Community Based Services.

The penalty period for an institutionalized applicant begins when the individual is receiving an institutional level of care for which he/she would be eligible if not for imposition of the transfer penalty. If the individual is otherwise eligible for Medicaid, he/she may receive Medicaid for all services except:

- Nursing facility services;
- Nursing facility services provided in an institution that is equivalent to that of nursing facility services;
- Home and Community Based Waiver Services

An application for Home and Community Based Services (HCBS) cannot trigger the start of a transfer penalty period. As indicated, a penalty can only start when an individual is receiving an institutional level of care for which he/she would be eligible if not for imposition of the transfer penalty. The transfer penalty does not allow an individual to enter into an HCBS waiver program; therefore, the start date for the penalty cannot be triggered and the individual remains ineligible as long as the transfer is within the 5-year lookback period.

If an individual or his/her spouse has a penalty as the result of a transfer, use the following guidelines to handle the imposition of the penalty:

- Nursing Home Assistance
    - Vendor payment (room and board) is denied or terminated for the duration of the penalty period;
    - Medicaid is approved for all other services.

Home and Community Based Services

- If Medicaid eligibility is dependent on participating in the waiver, the application is denied or the case is closed until the transfer is outside the 5-year look back period;
- Can be approved in a Medicare Savings Program (QMB, SLMB, QI) if all other criteria are met.

Examples

1. Jill entered a nursing home on January 10, 2008. She applied for nursing home Medicaid on August 12, 2008. During the interview, a $50,000.00 transfer of assets on January 5, 2006 was discovered. This transfer took place within the 5 year look back period; however, it was prior to DRA. The transfer penalty will begin the month of the transfer which January 2006. The penalty period will be determined by dividing $50,000.00 by $3,100.00. The penalty period is 16 months. The penalty expired prior to Jill asking for Medicaid coverage.

   HCBS- Pre-DRA, the same rules for calculating the penalty for nursing homes were used for waivers. So, in this case, waiver eligibility can be considered. If this transfer had occurred after February 8, 2006, Jill would have to wait a full 5 years before waiver eligibility could be considered or the transferred assets could be returned to Jill.

2. Tom transferred his home to his brother in September 2007. The home was valued at $78,200.00. This transfer occurred within the 5 year look back period but after the effective date of DRA. Tom has asked for nursing home Medicaid beginning September 2008.

   The penalty will begin the month that services are requested if eligible on all other criteria. The penalty period will be calculated by dividing $78,200.00 by $4,600.00. The penalty period will be 17 months. Tom can be approved for LTC Medicaid with a stop payment to the nursing home for 17 months.. If the brother returns the home property to Tom, the transfer penalty can be erased.

   HCBS—Since this transfer occurred after DRA, Tom cannot be eligible for waiver services until the transfer is outside the 5 year look-back period, unless the property is returned.

304.01.05F MULTIPLE PERIODS OF INSTITUTIONALIZATION AND MULTIPLE APPLICATIONS

When an individual has multiple periods of institutionalization or has made multiple applications for Medicaid (unless the application was withdrawn), the look-back date is based on a baseline date that is the first date upon which the individual has both applied for Medicaid and is institutionalized. Each individual has only one look-back date, regardless of the number of periods of institutionalization, applications for Medicaid (the exception is a withdrawn application), periods of eligibility or transfers of assets.

304.01.05G EFFECTIVE DATE OF PENALTY

Effective February 8, 2006, the date of the penalty will begin with the later of:

- The first day of a month during which assets have been transferred for less than fair market value; or

- The date on which the individual is eligible for medical assistance based on all factors of eligibility being met and is receiving institutional level of care services (based on an approved application for such services) that, were it not for the imposition of the penalty period would be covered by Medicaid.

  Recipients are prohibited from transferring resources after approval. For transfers discovered after approval, the penalty is imposed beginning with the month of the transfer, allowing for rebuttal and advance notice. An improper payment report will be prepared for any ineligible months before the penalty is imposed. If the penalty period has ended, the improper payment would cover all months of the penalty period.

For applications on or after 2-8-06, handled under DRA rules, the penalty will begin the month that Long Term Care services are requested if the individual is otherwise eligible for Medicaid. If an individual is already eligible for Long Term Care Services and a transfer of assets is discovered, the penalty will begin the month of the transfer.

Under the provisions of OBRA-93, the date of the penalty period is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this policy.

304.01.05H PENALTY PERIOD

The number of months of ineligibility for an institutionalized individual shall be equal to:

- The total, cumulative uncompensated value (UV) of all assets transferred by the individual (or individual's spouse) on or after the look back period

  divided by

- The average monthly cost to a private pay patient for nursing facility services in Mississippi. The average private rates are:

  - Effective 02/08/06 ongoing - $4,600.00
  - From 03/01/03 -- 02/07/06 - $3,100.00
  - From 04/01/99 -- 02/28/03 - $2,600.00
  - From 10/01/93 -- 03/31/99 - $2,000.00

304.01.05I DRA PROVISION - PARTIAL MONTH PENALTY

Under the DRA, when the amount of the transfer is less than the average monthly cost of nursing facility care, a penalty is imposed for less than a full month. This is called a partial month penalty.

Rounding down or otherwise disregarding any fractional part of an ineligibility period when determining the penalty period is not allowed effective 02/08/06. The average daily per diem of $151.00 is used in determining the partial month penalty period.

Example

An individual makes an uncompensated transfer of $30,534.00 in April 2006. He applies for Medicaid coverage for long-term care services in September 2008. The transfer falls within the 5 year look back period.

Therefore, the uncompensated transfer amount of $30,534.00 is divided by the average monthly rate of $4,600.00 and equals 6.64 months. The full 6 month penalty runs from September 1, 2008 (the month eligibility is requested) through February 28, 2009 with a partial month penalty calculated for March 2009. The penalty calculation is as follows:

Step 1: $30,534.00 uncompensated transfer amount divided by $4,600.00 average monthly private pay rate = 6.64 months in the penalty period

DRA Provision - Partial Month Penalty - Example (Continued)

Step 2: $4,600.00 average monthly private pay rate (x) 6 six full months penalty period = $27,600.00 penalty amount for six full months

Step 3: $30,534.00 uncompensated transfer amount (less) $27,600.00 penalty amount for 6 full months = $2,934.00 partial month penalty amount

Step 4: $2,934.00 partial month penalty amount (divided by) $151.00 daily rate (will be used for all transfers effective 2/8/2006) = 19.43 days or 19 days for partial month penalty

The month of March 2009 will have 19 days that a vendor payment will not be made to the nursing facility. Vendor payments will begin on day 20. Thus the total penalty period for the transfer of $30,534.00 will be September 1, 2008 through March 19, 2009.

HCBS and the Partial Month Penalty

If a transfer is discovered in an ongoing waiver case, the penalty period will be calculated the same as nursing home cases with the exception of the partial month. The penalty begins the month the transfer occurred; however, the "partial month' is extended to the end of the month for HCBS cases.

If the penalty period has not expired, the case will be closed and an improper payment report will be completed for the prior ineligible months. If the penalty period has expired, an improper payment will be completed for the transfer penalty period and the case will remain open. The client must be given the opportunity for rebuttal prior to preparing the improper payment report.

304.01.05J DETERMINING THE PENALTY WHEN PENALTY PERIODS OVERLAP

All countable transfers occurring during the look-back period are totaled and the penalty period determined by dividing the total UV by the average private pay rate. The first month of the transfer penalty period is the month in which the first countable transfer occurred.

Transfers that occur after a penalty period is in effect are added in full to the end of the penalty period currently in effect. There is no limit on the number of months a transfer penalty can be imposed. The penalty period is always determined by the total UV calculated during the look back period.

304.01.05K DETERMINING THE PENALTY WHEN PENALTY PERIODS DO NOT OVERLAP

When multiple transfers are made so that the penalty periods for each do not overlap, treat each transfer as a separate event with its own penalty period.

EXCEPTION: Consecutive transfers that occur on a regular basis must be calculated together. For example, an individual gave a relative $5,199.00 in April and $5,199.00 in May the two gifts are added together and divided by the average private pay rate.

NOTE: The penalty period for transfers occurring on or after February 8, 2006, and within the five year look-back period will begin the month that eligibility is requested or the first month eligibility is determined if the individual is not eligible in the month eligibility is requested.

304.01.05L TYPES OF TRANSFER OF ASSETS

The situations listed below are considered transfers of assets and may be subject to a penalty period for institutionalized and Home and Community Based individuals.

Treatment of Income as an Asset

Income, in addition to resources, is considered to be an asset for transfer (and trust) purposes. Thus, when an individual's income is given or assigned in some manner to another person, such a gift or assignment can be considered a transfer of assets for less than fair market value.

In determining whether income has been transferred, do not attempt to ascertain in detail the individual's spending habits during the look back period. Absent some reason to believe otherwise, assume that ordinary household income was legitimately spent on the normal costs of daily living.

However, you should attempt to determine whether the individual has transferred lump sum payments actually received in a month. such payments, while counted as income in the month received for eligibility purposes, are counted as resources in the following month if they were retained. Disposal of such lump sum payments before they can be counted as resources could constitute an uncompensated transfer of assets.

Also attempt to determine whether amounts of regularly scheduled income or lump sum payments, which the individual would otherwise have received, have been transferred. Normally, such a transfer takes the form of a transfer of the right to receive income. For example, a private pension may be diverted to a trust and no longer paid to the individual.

When a single lump sum is transferred (i.e., a stock dividend check is given to another person in the month in which it is received by the individual), the penalty period is calculated on the basis of the value of the lump sum payment.

When a stream of income, (i.e., income received in a regular basis, such as a pension) or the right to a stream of income is transferred, calculate the penalty period as you would for a lump sum. Using this method, a penalty period is imposed for each income payment.

Treatment of Income As An Asset (Continued)

When the transfer involves a right to income (as opposed to periodic transfer of income the individual owns) make a determination of the total amount of income expected to be transferred during the individual's life, based on an actuarial projection of the individual's life expectancy, and calculate the penalty on the basis of the projected total income.

Conveyance for Less than Fair Market Value

Giving away or conveying an asset for less than fair market value within the look back period for an institutionalized or HCBS individual may be considered a transfer of assets.

Waiving an Inheritance or Other Entitled Benefit

Refusal to accept an inheritance or refusal to take legal action to obtain benefits an individual is entitled to receive may be considered a transfer of assets.

Annuities When Expected Returns Are less than Cost of Annuity

Establishing or purchasing annuities in which anticipated payments based on life expectancy of the individual are less than the cost of the annuity. The policy on annuities is explained in detail on previous pages.

Irrevocable Burial Contracts Under Certain Circumstances

An irrevocable burial contract or similar device established by the funeral home/director is considered a transfer of assets if the cost to the individual or spouse exceeds the value of the merchandise and/or services. The specialist will obtain an itemized statement to assist in determining whether the costs are commensurate with the value of the merchandise and/or services.

Transfers by a Spouse

Transfers made by the Community Spouse (CS) will create a penalty for the Institutionalized Spouse (IS). Transfers by the CS **after** the IS has been determined eligible will also create a penalty for the IS.

Transfers by a Spouse (Continued)

If the CS becomes institutionalized and applies for Medicaid during the penalty period, the penalty must be apportioned between both spouses. However, if the IS has already served the penalty in full, it will not be applied a second time. If one member of the couple should leave the facility or die, the remaining portion of the penalty must be served by the remaining institutionalized spouse.

Transfers of Jointly-Held Assets

In the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

Under this provision, merely placing another person's name on an account or asset as a joint owner might not constitute a transfer of assets subject, of course, to the specific circumstances of the situation. In such a situation, the individual may still possess ownership rights to the account or asset and thus have the right to withdraw all of the funds in the account or possess the asset at any time.

Thus, the account or asset is still considered to belong to the individual. However, actual withdrawal of funds from the account or removal of the asset by the other person removes the funds or property from the control of the individual and so constitutes a transfer of assets.

Also, if placing another person's name on the account or asset actually limits the individual's right to sell or otherwise dispose of the assist (e.g., the addition of another person's name requires that the person agree to the sale or disposal of the asset where no such agreement was necessary before), such placement constitutes a transfer of assets.

Use regular Medicaid rules to determine what portion of a jointly held asset is presumed to belong to an applicant or recipient. This portion is subject to a transfer penalty if it is withdrawn by a joint owner.

Personal Service Contracts

A personal service contract should be a written contract between the recipient/applicant and the personal services provider. The contract should be executed prior to the date any payments have been made to the provider. If payments have been made prior to the date of the contract these payments should be considered as transfers.

Once an individual begins receipt of Medicaid Long Term Care (LTC) services, the individual's personal and medical needs are considered to be met by the LTC provider. Payments to other individuals for services received after the individual enters LTC are considered an uncompensated transfer for Medicaid purposes.

The contract should be very specific as to the services to be provided and the payment to be paid for the services. Each service/duty should be listed with the number of hours for each service with the amount charged for each service. If the contract calls for a payment of a specific amount per hour, this amount should be reasonable. For example, nursing charges will not be allowed for non-nurses and CPA charges will not be allowed for persons who are not CPA's. Documentation of the services performed and the number of hours for each service should be submitted. All charges will be evaluated based on usual and customary charges for services in the community.

The contract must not provide for payment of compensation for future services. All payments should be made only as the services are actually rendered. Any payments made for future services should be considered as transfers. Contracts indicating a prior date but no payments have ever been made should be questioned as to why the payments for services were not made when the services were performed. This type of arrangement indicates services were provided for free. Services provided for free are not under obligation to be paid at a future unknown date.

Legal and/or Professional Fees Associated with Qualifying for Medicaid

Retaining an attorney in order to assist a family with the Medicaid application process is anyone's right. There may be instances where a family is in need of legal services to draw up various legal documents that are needed in association with the long term institutionalization of an elderly or disabled individual. However, many times these documents are either non-allowable, of no benefit to the applicant or are not required as part of the Medicaid application.

Legal and/or Professional Fees Associated with Qualifying for Medicaid (Continued)

The Division of Medicaid does not impose a limit on the amount of fees an attorney may charge a family; however, there is a limit on the legal fees associated with preparing documents in the spend-down process of an applicant's resources. The limit can also be applied to non-lawyers, but only those whose business it is to advise the elderly and disabled about Medicaid. If it cannot be determined that the person charging the fee has a business or represents a business that does Medicaid planning, the fee will be considered as a transfer.

The following instructions will address two (2) separate fees or contracts:

- **Professional Fees Associated with Filing a Medicaid Application**

  A capped fee of $2,000.00 is allowed for professional services incurred for assisting in the Medicaid application process. This maximum amount takes into consideration the estimated time of completing a Medicaid application, appearing with the individual for the in-person interview and assisting with the necessary documentation needed to apply. This fee also includes involvement with any appeal process that may be necessary.

  This capped fee is for expenses paid from the applicant's funds and does not attempt to set a maximum fee that can be charged to other family members that do not include the applicant or his/her spouse. When evaluating the spend-down of excess resources for an applicant, only $2,000.00 will be allowed from the applicant's resources. Amounts paid in excess of the capped fee will be treated as a transfer of resources in order to qualify for Medicaid.

- **Legal Fees Associated with Preparing a Trust**

  A copy of any trust agreement must be submitted for review along with the amount charged for preparing the trust. The attorney must explain how the trust benefits the Medicaid applicant or recipient in order for the Division of Medicaid to make a decision on whether the charge is allowable. It is only the legal fee that will be evaluated based on the benefit the trust provides. The terms of the trust itself will be evaluated using Medicaid's trust and transfer policy.

Legal Fees Associated with Preparing a Trust (Continued)

If Medicaid determines that the trust benefits the Medicaid applicant or recipient from a Medicaid perspective, a capped fee of $1,500.00 is allowed for preparing the trust document. Income Trust documents are subject to a lesser cap of $500.00 since the Division of Medicaid provides a model trust agreement for this provision. Fees paid from the applicant's money which are above the capped limit will be treated as a transfer of resources.

304.01.05M EXCEPTIONS TO TRANSFERS

Home Property

The transfer penalty will not apply to the transfer of home property by an institutionalized individual to the following family members of such individual:

- The individual's spouse or child under age 21 or a disabled or blind adult child (Disability must be established and age verified); **or**
- A sibling who is part owner of the home who lived in the home for one (1) year prior to the individual entering a nursing facility; **or**
- A child who lived in the home for two (2) years before the individual entered a nursing facility and provided care to the individual which permitted the individual to remain at home.

  Sufficient documentary information must be provided to make a determination that (1) the child resided in the home for the required length of time. This may include statements from knowledgeable individuals when other verification is not available. (2) Whether the child provided care which enabled the parent to remain at home. If the child was employed outside the home, the arrangements for care while the child was away must be determined.

Non-Home Property

The transfer penalty will not apply to the transfer of any type of non-home asset in the following situations:

- Assets transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;
- Assets transferred from the individual's spouse to another for the sole benefit of the individual's spouse;
- Assets transferred to the individual's child under age 21 or a disabled or blind adult child. If the disabled adult child is not receiving a social security disability payment, a disability determination is required;
- Assets transferred to a Special Needs Trust established solely for the benefit of a disabled applicant less than 65 years of age.

EXCEPTIONS TO TRANSFERS (Continued)

In determining whether an asset was transferred for the sole benefit of a spouse, child, or disabled individual, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer.

A transfer without such a document cannot be said to have been made for the sole benefit of the spouse, child, or disabled individual, since there is no way to establish, without a document, that only the specified individuals will benefit from the transfer. An individual shall not be ineligible for medical assistance if an acceptable rebuttal is submitted and a satisfactory showing is made to the Division of Medicaid that:

- The individual intended to dispose of the assets either at fair market value or for other valuable consideration;
- The assets were transferred exclusively for a purpose other than to qualify for medical assistance;
- All assets transferred for less than fair market value have been returned to the individual; or
- The Division of Medicaid determines that denial of eligibility would work an undue hardship on the individual.

Undue Hardship

Undue hardship exists when:

- Application of the transfer penalty would deprive the individual of medical care such that his/her health or his/her life would be endangered.
- Application of the transfer penalty would deprive the individual of food, clothing shelter, or other necessities of life and cause severe deprivation.
- The applicant or spouse or representative has exhausted all legal action to have the transferred assets that caused the penalty returned.

Undue Hardship Provision (Continued)

Undue hardship does not exist when:

- Application of the application of the transfer of assets provision merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him or her at risk of serious deprivation.

- The assets were transferred to community spouse and the community spouse refuses to cooperate in making the resource available to the institutional spouse.

- The resource was transferred to a person (spouse, child, or other person) who was handling the financial affairs of the client or to the spouse or children of a person handling the financial affairs of the client unless it is established that the transferred funds cannot be recovered even through exhaustive legal measures.

Each case situation must be reviewed individually to determine if undue hardship exists. Generally, this provision is limited to financially and medically needy individuals with no possible means of recovering the transferred assets..

Undue Hardship Waiver Requested by Facility

Effective February 8, 2006, an undue hardship waiver may be requested by the facility in which the person resides on behalf of the individual if the facility has the individual's consent, or their person representative's consent. The hardship waiver is for the recipient, not the hardship of the facility. The agency provides that, while an application for an undue hardship waiver is pending in the case of an individual, who is a resident of a nursing facility, payments to the nursing facility to hold the bed for the individual will be made for a period not to exceed 30 days.

Exception for Transfers to Community Spouse or Third Party

Section 1924 of the Act sets forth the requirements for treatment of income and resources where there is an individual in a medical institution with a spouse still living in the community. This section of the Act provides for apportioning income and resources between the institutional spouse and the community spouse so that the community spouse does not become impoverished because the individual is in a medical institution.

Exception for Transfers to Community Spouse or Third Party (Continued)

The exceptions to the transfer of assets penalties regarding inter-spousal transfers and transfers to a third party for the sole benefit of a spouse apply even under the spousal impoverishment provisions. Thus, the institutional spouse can transfer unlimited assets to the community spouse or to a third party for the sole benefit of the community spouse.

When transfers between spouses are involved, the unlimited transfer exception should have little effect on the eligibility determination, primarily because resources belonging to both spouses are combined in determining eligibility for the institutionalized spouse. Thus, resources transferred to a community spouse are still considered available to the institutionalized spouse for eligibility purposes.

The exception for transfers to a third party for the sole benefit of the spouse may have greater impact on eligibility because resources may potentially be placed beyond the reach of either spouse and thus cannot be counted for eligibility purposes. However, for the exception to be applicable, the definition of what is for the sole benefit of the spouse must be fully met.

This definition is fairly restrictive, in that it requires that any transferred funds be spent for the benefit of the spouse within a time-frame actuarially commensurate with the spouse's life expectancy. If this requirement is not met, this exemption is void, and a transfer to a third party may then be subject to a transfer penalty.

304.01.05N TRANSFER OF ASSETS NOTIFICATION

The applicant/client will be notified via the appropriate DOM-322, Notice of Transfer of Assets, i.e., OBRA 93 or DRA, regarding countable transfers and the penalty period. The transfer and the penalty must be clearly indicated. The notice allow the client or representative time to present evidence to show that the transfer should not count. Evidence should include a written rebuttal plus any pertinent documentary evidence.

If no rebuttal is offered, the penalty will be applied and the appropriate adverse action notice. Individuals in nursing homes remain eligible for all other Medicaid services if the transfer penalty is the only factor of ineligibility; therefore, payment of nursing home services only will be denied or terminated. If the individual is ineligible on other factors as well as the transfer, the application or case must be denied or terminated. If Medicaid eligibility is dependent on participating in the HCBS waiver program, the application is denied or the case is closed until the transfer is outside the 5-year look back period; These individuals can be approved in a Medicare Savings Program (QMB, SLMB, QI) if all other criteria are met.

NOTE: Notice to the client via DOM-322 is required whenever a transfer is being charged. This is true even if the penalty period has expired and the action to be taken is an improper payment. DOM-322 must be issued prior to submitting an improper payment in order to allow the client the chance to rebut the transfer. All DOM-322s must be submitted for approval to the Bureau Director, Deputy prior to issuance.

304.01.05O REBUTTAL PROCESS

Written rebuttals along with the Regional Office decision regarding acceptability are to be submitted to the Bureau Director, Deputy, prior to issuing final notice to the client. The material submitted to State Office should include the rebuttal, a copy of DOM-322 issued to the client, and a summary of the circumstances surrounding the transfer. The Bureau Director, Deputy, will issue a memorandum to the Regional Office explaining the final decision on the transfer.

304.01.05P RETURN OF A TRANSFERRED RESOURCE

If a transferred resource is returned to, or if compensation is received by, the institutionalized individual, the UV is no longer an issue or is reduced as of the date of the return. The resource or compensation is evaluated according to normal resource rules in the month of return. Any portion of a transferred resource that is not returned continues to count as UV which means the penalty period must be re-evaluated.

304.01.05Q RECALCULATION OF A PENALTY PERIOD

A penalty period must be recalculated from the month a portion of the resource is returned or additional compensation is received.

Example: A transfer of $13,800.00 occurred in October 2008, resulting in a 3-month penalty period beginning with the month that LTC is requested or eligibility is determined. In January 2009, $9,200.00 is returned to the institutionalized individual. The penalty period is then recalculated using the UV of $4,600.00 transferred in October 2008. This results in a revised period of ineligibility for one (1) month beginning with the month that LTC is requested or eligibility is determined.

NOTE: If the resource is returned, normal resource rules apply in determining Medicaid eligibility.

304.01.04R TRANSFER PENALTY INVOLVING SSI MONTHS

The transfer penalty can be imposed during months that an individual receives SSI or is SSI eligible in a nursing home. Notices for SSI eligibles must not be sent verifying eligibility for nursing facility services until the possibility of any transfers have been developed.

Example: A Medicaid application is filed in July 2008 for an applicant who entered the nursing home in May 2008 as an SSI-eligible. SSI eligibility continued until July 31, 2008. A transfer, which occurred in May 2008, is discovered during the Medicaid application process and it results in a 6-month period of ineligibility. The penalty can be imposed for May 2008 through October 2008 even though the months of May 2008 through July 2008 are SSI months. This means no vendor payment will be authorized for the 6-month penalty period; however the individual is eligible for all other Medicaid services.

DOM-322 DRA
Revised 05-01-2010

Regional Office: _____

NOTICE OF TRANSFER OF ASSETS

_____ Case Name: _____

_____ Medicaid ID: _____

_____

Anyone applying for or receiving long term care services in a nursing home or Home and Community Based Waiver is prohibited from transferring assets at any time during the 60-month period (5 years) before applying for Medicaid and during the time Medicaid is received. If assets are transferred, a period of ineligibility shall be charged which is equal to the number of months required to deplete the total uncompensated value based on the total value of all transferred asset(s) divided by the average cost of monthly nursing home care to a private pay patient as determined by the Division of Medicaid. The period of ineligibility begins when the recipient asks for coverage or is otherwise eligible for nursing home Medicaid.

Nursing home recipients under a transfer penalty will receive all services except payment to the nursing home for room and board. Eligibility cannot be established for a Home and Community Based Waiver (HCBS) recipient during the transfer period; therefore, the transfer must be outside the 5 year look-back period. This transfer of assets provision applies to assets transferred on or after February 8, 2006, as specified in the Deficit Reduction Act of 2005. Assets can be returned in full and the transfer will be erased. Returned assets will be evaluated according to ongoing resource rules.

Listed below is specific information about assets transferred by the Medicaid applicant/recipient named above:

Resource(s)transferred: _____

_____

Uncompensated Value: _____

Period of Ineligibility for □ **Nursing Home Services** is _____months and _____ days.

Beginning: _____ Beginning and end dates are subject to change. You will be

Ending: _____ issued a revised DOM-322 if any dates change.

NOTICE OF TRANSFER OF ASSETS

☐ **HCBS Waiver Services** (application)

Beginning: _____ Eligibility cannot start until after the

Ending: _____ 60-month look back period.

☐ **HCBS Waiver Services** (transfer discovered after initial approval)

Beginning: _____

Ending: _____

If you wish to rebut the transfer charge, you must give us evidence that the individual intended to dispose of the resource(s) either at current market value or for other valuable consideration or that resource(s) were transferred exclusively for a purpose other than to qualify for Medicaid. You have ten days from the receipt of this notice to submit such evidence before final action is taken on the case. An undue hardship waiver may be requested by a client or the client's authorized representative. The facility in which the person resides may apply for a hardship waiver on behalf of the individual if the facility has the individual's consent, or their personal representative's consent. If you claim undue hardship, Medicaid will review on a case by case basis using established policy located in the Eligibility and Procedures Manual. The hardship waiver is not related to a hardship for the facility, but rather a hardship for the recipient. You have ten (10) days from the date of receipt of the notice to submit your rebuttal before action is taken on the case.

Medicaid Specialist: _____Date: _____

DOM-322 DRA NOTICE OF TRANSFER OF ASSETS INSTRUCTIONS

PURPOSE

The purpose of this form is to give notice to a nursing home or HCBS client that a period of ineligibility exists as a result of a transfer of assets on or after February 8, 2006. DOM-322 informs the client/representative that a 10-day period is allowed in which rebuttal evidence may be presented. This form does not replace the advance notice which must be issued if the rebuttal is not successful.

INSTRUCTIONS

The completed form must be submitted to the appropriate Bureau Director, Deputy, for approval prior to issuance to the client. . Prepare an original and 2 copies. The original is given or mailed to the client or representative and 1 copy is retained in the case record. The third copy is used as a tickler copy to hold for 12 days. Twelve (12) days allows mailing time. The client has 10 days from receipt of the notice to respond.

Enter the appropriate information pertaining to the transfer(s) being charged. List all specific resource(s) that were transferred. List the uncompensated value of the transferred resource(s). The uncompensated value is the difference between the fair market at the time of the transfer (less any outstanding loans, mortgages, or other encumbrances on the asset) and the amount received for the asset.

PERIOD OF INELIGIBILITY

Check the appropriate box—Nursing Home Services, HCBS Waiver Services (application) or HCBS Waiver Services(transfer discovered after initial approval).

The beginning date for nursing home services is the first day of the month in which the recipient asked for coverage/or the first day of the month in which eligibility can be established.

The beginning date for HCBS waiver services the first day of the month in which the asset was transferred.

The ending date for nursing home services is the last day that was computed when dividing by the average cost of monthly nursing home care. This date may reflect a partial month penalty.

PERIOD OF INELIGIBILITY (Continued)

The ending date for Community Based Waiver Services (application) is the last day of the month, 5 years after the transferred occurred. The transfer must be out of the 5 years look back period.

Example: Medicaid application date is 12-20-09.
The 5 year look back period is 12-1-04 through 12-31-09.
The transfer took place on 07-12-07.
The transfer was within the 5 year look back period.
The ending date would be 07-31-12. Any eligibility established after 07-31-12 would not include this transfer.

The ending date for Community Based Waiver Services (transfer discovered after initial approval) is the last day of the month that was computed when dividing by the average cost of monthly nursing home care. This date will not reflect a partial month penalty. If the calculation ends during the month, the penalty will extend to the last day of the month.

Example: Transfer took place on 08-10-2008.
Uncompensated value is $50,000.00
$50,000.00 divided by $4600 equals 10.86 or 10 months
$4600 times 10 months equals $46,000
$50,000 minus $46,000 equals $4,000
$4,000 divided by $151 equals 26 days

Since HCBS eligibility cannot start in the middle of the month, the penalty is a full 11 months.

The Medicaid Specialist must sign and date the form.